STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2001
v	No. 219434 Berrien Circuit Court
DAVID PAUL FLICK, Defendant-Appellant.	LC No. 98-402012-FC

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317, for the death of eight-month-old David McBain, the son of defendant's fiancée. After defendant's first trial ended with a hung jury, defendant was retried and convicted by a jury of second-degree murder. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to a term of thirty to seventy-five years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant claims that his conviction at his retrial for second-degree murder violated his right against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Defendant argues that there was no manifest necessity demonstrated for granting the mistrial of the first trial because the trial court failed to poll the jurors prior to their discharge regarding whether they unanimously agreed that defendant was not guilty of second-degree murder. We conclude that defendant's claim is without merit.

Once a jury is selected and sworn and jeopardy has attached, as in the instant case, if the trial is ended prematurely, a retrial for the offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of manifest necessity. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). See US Const, Am V; Const 1963, art 1, § 15. A deadlocked jury constitutes manifest necessity. *Mehall, supra* at 4; *People v Daniels*, 192 Mich App 658, 662-663; 482 NW2d 176 (1992). In *People v Hickey*, 103 Mich App 350, 353; 303 NW2d 19 (1981), our Court determined, "The protection against double jeopardy does not require a trial court to inquire as to the status of jury deliberations on the included offenses before it declares a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

mistrial due to a hung jury." Accord, *Daniels, supra.* Defendant presents no compelling reasons to depart from this established rule, other than arguments that have already been presented to and twice rejected by this Court. *Daniels, supra; Hickey, supra.* We continue to adhere to the rule in *Hickey* and hold that defendant's right against being twice placed in jeopardy for the same offense was not violated.

II

Next, defendant claims that he was denied the effective assistance of counsel because (1) his trial counsel failed to request that a portion of videotape from the first trial be presented to impeach the pediatric neurologist regarding his change of opinion as to the cause of the victim's death,[1] and counsel failed to move for a mistrial following the admission of this testimony, (2) counsel failed to investigate improper medical treatment, and (3) defense counsel failed to request an instruction on the "intent to injure" form of involuntary manslaughter as a lesser offense, CJI2d 16.10(4).

Because defendant did not make a testimonial record below, our review is limited to the facts contained on the record at trial. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance was objectively unreasonable and (2) that defendant was prejudiced to the extent that it denied him a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994) Counsel's performance is to be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A

As to his first claim, defendant has not demonstrated that the videotape of a portion of Dr. Fain's testimony was such a crucial piece of evidence that there would have been a reasonable probability of a different outcome at the second trial if the portion of the videotape had been shown to the jury. Generally, a defendant is not entitled to a new trial where the testimony of a witness is corroborated by other testimony or where impeachment evidence not produced at trial merely furnishes an additional basis on which to impeach a witness whose credibility has already

[1] At the first trial, Dr. Fain testified that there was evidence of edema or brain swelling that produced herniation, a treatable condition, which led to the infant's death. At the second trial, Dr. Fain rendered his opinion, which he acknowledged that he formed the night before he testified at the second trial, that the infant died as the result of brain shearing caused by Shaken Baby Syndrome. This is an untreatable condition that results in death.

been shown to be questionable. *People v Lester*, 232 Mich App 262, 283; 591 NW2d 267 (1998).

Here, Dr. Fain's testimony that the victim's condition was irreversibly fatal from the outset corroborated that of Dr. Meyers and Dr. Page. Moreover, his testimony that retinal hemorrhaging was present, which is an indicator of Shaken Baby Syndrome, was consistent with his testimony in the first trial. The videotape would merely have furnished an *additional* basis on which to impeach Dr. Fain, whose credibility was already extensively impeached during defense counsel's cross-examination. Defendant has not shown that counsel's failure to use the videotape prejudiced defendant to the extent that it denied him a fair trial or that it was not a matter of sound trial strategy. *Pickens, supra; Stanaway, supra.* Accordingly, defendant has not shown that counsel's failure to move for a mistrial on the basis of Dr. Fain's changed opinion constitutes ineffective assistance of counsel.

B

Defendant also claims his counsel was ineffective for failing to investigate the facts concerning allegedly improper medical treatment of the infant, and, specifically, the change in the expert opinion of Dr. Fain. Counsel's failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, i.e., one that might have made a difference in the outcome of the trial. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). We find no deficiency apparent on the record that might have affected the outcome of the trial.

C

Defendant's third basis for his ineffective assistance of counsel claim is likewise without merit. The trial court instructed the jury on involuntary manslaughter based on a "gross negligence" theory. See CJI2d 16.10(3). Defense counsel did not request the instruction on the "intent to injure" theory, otherwise known as the "misdemeanor-manslaughter rule." See CJI2d 16.10(4) and *People v Datema*, 448 Mich 585; 533 NW2d 272 (1995). Under that rule, if a defendant commits an assault and battery with a specific intent to inflict injury and causes unintended death, the defendant may be found guilty of involuntary manslaughter. *Id.* at 608.

Even assuming that there was evidence presented by the prosecutor to support an instruction on the "intent to injure" version of involuntary manslaughter, this instruction would have conflicted with the theory advanced by the defense—that defendant had no intent to injure the baby and that defendant did not commit an assault and battery on the baby. The evidence tended to show that the alleged batteries inflicted on the eight-month-old child were extremely forceful and would naturally tend to, and did in fact, cause serious injury. It was not unreasonable, and clearly not against sound trial strategy, for defense counsel to present only the "gross negligence" theory of involuntary manslaughter that was consistent with defendant's testimony, which did not admit an intent to injure. *Stanaway, supra.* For defense counsel to then request an involuntary manslaughter instruction that is premised on an intent to injure might have

undermined defendant's case. We will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). And we will not analyze the propriety of defense counsel's possible strategic decision with the benefit of hindsight that counsel's strategy did not work. *LaVearn, supra* at 216*; Rice, supra*. Defendant has not overcome the strong presumption that his counsel's decision was a matter of sound trial strategy, and he has not shown that he was deprived of the effective assistance of counsel. *Stanaway, supra; Pickens, supra.*

III

Third, defendant contends that he was denied his due process right to a fair trial based on purportedly improper remarks by the prosecutor during rebuttal argument wherein the prosecutor referenced a law suit against the hospital that treated the victim. Defendant further asserts that the prosecutor improperly appealed to the sympathy of the jury to "stand up" for the victim and convict defendant of second-degree murder.

After reviewing the pertinent portion of the record and evaluating the prosecutor's remarks in context, we conclude that the prosecutor's remarks were not improper. The remarks were based on the evidence and reasonable inferences arising from the evidence at trial, and they were in response to defense counsel's arguments. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, the remarks were not so inflammatory that defendant was prejudiced by the remarks such that the instructions of the trial court could not have eliminated any prejudice. *Id.*; *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). The trial court instructed the jury that it was to focus on defendant's guilt or innocence in this matter, not focus on a civil suit against the hospital, and it instructed the jury that sympathy must not influence their decision. Defendant has not demonstrated that he was denied a fair trial or that he suffered a miscarriage of justice due to the prosecutor's remarks. *Stanaway, supra* at 687.

IV

Defendant argues on appeal he was denied his due process right to a properly instructed jury because (1) the trial court did not instruct the jury as requested by defense counsel on accident pursuant to CJI2d 7.2, which is given where a defendant acknowledges that his act was voluntary but the consequences of the act unintended, and (2) defense counsel did not request, and the trial court did not sua sponte issue, an instruction on accident pursuant to CJI2d 7.1, where the defendant alleges that the act itself was entirely accidental and involuntary. See Use Notes to CJI2d 7.1 and 7.2.

Reviewing the jury instructions in their entirety, *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), we conclude that the instructions sufficiently protected defendant's rights. The trial court instructed the jury on the crimes of second-degree murder and involuntary manslaughter. Because second-degree murder includes intent as one of its elements, the occurrence of the crime is inconsistent with accident and is excusable if the killing is accidental. *People v St Cyr*, 392 Mich 605; 221 NW2d 389 (1974); *People v Hess*, 214 Mich App 33, 37-38;

543 NW2d 332 (1995). In contrast, the crime of involuntary manslaughter, with which the jury in this case was also instructed, is not an intent crime and accident is not a defense to this offense. *Id.* at 39.

The jury was given a clear choice of finding that defendant acted with the specific intent to commit second-degree murder, that he acted with gross negligence—which is more than a mere accident—or that neither of these were proven and that defendant was not guilty. The jury rejected the concept of "gross negligence"—as either committed by defendant or by the doctors who treated the victim—and found beyond a reasonable doubt that defendant had the necessary specific intent for second-degree murder. Defendant has not shown that the trial court's failure to issue an instruction on accident resulted in a miscarriage of justice or constituted a plain error that adversely affected defendant's substantial rights, i.e., that defendant was actually innocent or the alleged error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999). Defendant's claims of instructional error are without merit.

V

Defendant argues that there was insufficient evidence to sustain his conviction of second-degree murder because the prosecution failed to establish the requisite intent. When reviewing a claim of insufficient evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). There was testimony and evidence to support a conclusion of the requisite intent where the doctors and medical reports indicated that the infant died of blunt force trauma sustained while in defendant's care. Any concerns defendant raises regarding witness bias and disputed evidence were matters of the weight of the evidence and the credibility of witnesses, which were within the province of the jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

VI

Defendant argues that the trial court abused its discretion in sentencing him. This issue is not preserved for review. A defendant must provide this Court with a copy of the presentence report to preserve a claim of disproportionality. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Regardless, we find no basis for concluding that defendant's sentence violates the principle of proportionality, given the circumstances of the offense and defendant's status as a fourth habitual offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof